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No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

CITY OF CHICAGO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. 552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database), and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

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The Solicitor General, on behalf of the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 287 F.3d 628. The order amending the opinion upon denial of rehearing (Pet. App. 17a–18a) is reported at 297 F.3d 672. The opinion of the district court (Pet. App. 19a-30a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 25, 2002. A petition for rehearing was denied on July 25, 2002

(Pet. App. 17a–18a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part as follows:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * [or] (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy * * *.

5 U.S.C. 552(b)(7)(A) and (C).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b), however, identifies categories of records that are exempt from compelled disclosure. The Act thus reflects Congress's determination "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action of Haw.*, 454 U.S. 139, 144 (1981). In particular, FOIA Exemption 7, 5 U.S.C. 552(b)(7), authorizes an agency to withhold various categories of "records or information compiled for law enforcement purposes."

FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A), authorizes the withholding of law enforcement records where disclosure "could reasonably be expected to interfere with enforcement

proceedings." In invoking Exemption 7(A), an agency need not demonstrate a likelihood of interference with law enforcement on a document-by-document basis. Rather, the agency and the reviewing court may "determin[e] that, with respect to particular *kinds* of enforcement proceedings, disclosure of particular *kinds* of investigatory records while a case is pending would *generally* 'interfere with enforcement proceedings.'" *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978) (emphasis added).

FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), authorizes withholding of records where release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The determination whether an invasion of privacy is "unwarranted" within the meaning of Exemption 7(C) requires a balancing of the public interest in disclosure against the privacy interests that Congress intended to protect through the exemption. *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762 (1989). "[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government.*" *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 495 (1994) (brackets and internal quotation marks omitted); see *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). Moreover, the balance "cannot turn on the purposes for which the request for information is made," because the FOIA "give[s] any member of the public as much right to disclosure as one with a special interest [in a particular document]." *Dep't of Defense* v. *FLRA*, 510 U.S. at 496 (quoting *Reporters Committee*, 489 U.S. at 771); see *Bibles*, 519 U.S. at 356.

2. The Bureau of Alcohol, Tobacco and Firearms (ATF) is a regulatory and criminal investigatory agency within the

Department of the Treasury that is responsible for, *inter alia*, the enforcement of federal firearms laws. ATF maintains the Firearms Tracing System (FTS), an electronic database that serves to support criminal investigations by federal, state, local, and international law enforcement agencies. This case arises out of a FOIA request for data from two sub-modules of the FTS—the Trace Database Sub-Module (Trace Database) and the Multiple Sales Database Sub-Module (Multiple Sales Database). Pet. App. 43a.[1]

The Trace Database is a compilation of data submitted by law enforcement agencies to ATF when they request traces

[1] The nature and purposes of the Trace and Multiple Sales Databases, and the justifications for ATF's disclosure policies with regard to those records, were described in a declaration executed by David L. Benton, ATF's Assistant Director for Field Operations. Pet. App. 31a-71a. Mr. Benton was at that time the principal assistant to the Director in policy formulation and implementation of ATF's enforcement efforts involving ATF Special Agents and inspectors assigned to ATF's 23 field divisions nationwide. In that capacity, Mr. Benton personally reviewed or was briefed daily on investigations pertaining to criminal firearms enforcement. Mr. Benton began his ATF career as a Special Agent in 1975 and has served in a variety of managerial and supervisory positions. During his career, Mr. Benton has initiated numerous firearms traces as a criminal investigator and has supervised a wide variety of firearms enforcement activities, including investigations of firearms traffickers and violent criminal organizations. In his prior position as Assistant Director for Liaison and Public Information, Mr. Benton was responsible for all ATF FOIA disclosure decisions and served as the deciding official on numerous FOIA requests for data from the Trace Database. *Id.* at 31a-33a. Mr. Benton is currently ATF's Deputy Director.

Appended to Mr. Benton's declaration were letters to the Director of ATF from the National President of the Fraternal Order of Police and the Chairman of the Law Enforcement Steering Committee. Those letters urged ATF not to release to the public the contents of the Trace Database, based on concern that disclosure of the data could lead to destruction of evidence and possible harm to law enforcement personnel, informants, and witnesses. Gov't C.A. App. 90-93.

of firearms believed to have been used in criminal activity, as well as information acquired through ATF's traces of those guns. "Tracing" a firearm is the systematic tracking of the weapon from the manufacturer or importer through wholesalers to the federally licensed retail seller and ultimately to the first retail purchaser. Pet. App. 35a. The Trace Database contains approximately 300 data elements for each trace request, and it is compiled from approximately 200,000 firearm traces conducted by ATF annually. *Id.* at 37a, 44a.[2] Pursuant to FOIA Exemption 7(A), ATF withholds all information in that database for one year, and nine of the 300 data elements for five years. The nine elements withheld for five years consist of information identifying the law enforcement agency requesting the trace (code assigned to agency, agency name, agency city, and agency zip code); weapon data (serial number, if the firearm was involved in multiple sales, and importer name); firearms dealer identification data (license number or "invalid" dealer number for a source that does not have a federal license); and date of retail purchase. See *id.* at 47a n.2, 50a. Names and addresses of private individuals, including the locations where traced firearms were recovered, are withheld indefinitely for privacy reasons under FOIA Exemption 7(C). *Id.* at 64a-69a.[3]

[2] The 300 elements consist of data relating to (a) the law enforcement agency requesting the trace; (b) the date and location where the traced firearm was recovered; (c) the purchaser of the firearm; (d) the possessor of the firearm and any associates at the time of its recovery; (e) the licensed dealers who have sold the firearm; and (f) the traced weapon itself (*e.g.*, the manufacturer, model, weapon type, caliber, and serial number). Pet. App. 44a-45a.

[3] The court of appeals' opinion states that "ATF withholds indefinitely the individual names and addresses of all firearm purchasers, manufacturers, dealers and importers in both databases for privacy reasons." Pet. App. 4a. That is incorrect. Although the names and addresses of individual firearms *purchasers* (as well as other private individuals) are

The Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, requires a federally licensed firearms dealer to submit a report to ATF whenever he sells or otherwise disposes of two or more handguns to an unlicensed person within any five consecutive business days. 18 U.S.C. 923(g)(3)(A); see Pet. App. 35a. ATF's Multiple Sales Database contains information derived from those reports. *Id.* at 35a.[4] Such multiple sales are not unlawful in and of themselves, but they "may indicate illegal trafficking in firearms, and the multiple sales reports are often the starting points for investigations of illegal gun trafficking." *Ibid.* Under FOIA Exemption 7(A), ATF withholds all data in the Multiple Sales Database for a period of two years. *Id.* at 60a. After two years, ATF releases the entire Multiple Sales Database, except for individual names and addresses of retail firearms purchasers, which are withheld indefinitely pursuant to Exemption 7(C). See *id.* at 69a.

3. Respondent City of Chicago is engaged in pending state court civil litigation, in which respondent seeks injunctive relief and damages against certain gun manufacturers, distributors, and dealers. Pet. App. 2a. The suit alleges that the defendants' marketing practices have facilitated violations of respondent's firearms ordinances. *Ibid.* In furtherance of that litigation, the City made a FOIA request for access on CD-ROM to ATF's Trace and Multiple Sales Databases. See *ibid.*; Gov't C.A. App. 10, 12-13

withheld indefinitely under Exemption 7(C), the agency has not invoked Exemption 7(C) with respect to identifying information concerning manufacturers, dealers, or importers. Rather, that information is withheld temporarily pursuant to Exemption 7(A) and then released. See *id.* at 49a-52a, 54a-55a.

[4] The Multiple Sales Database includes information identifying the purchaser (name, address, date of birth); weapons information (manufacturer, weapon type, serial number and caliber); and dealer identifying information (name and address). See Pet. App. 45a.

(Compl.), 19 (March 3, 2000 demand letter). ATF provided respondent all data related to (a) traced firearms associated with crimes committed in Chicago and (b) multiple sales purchasers who are residents of Chicago, as a discretionary release to a local law enforcement agency pursuant to the Gun Control Act of 1968. See Pet. App. 3a-4a; 18 U.S.C. 923(g)(1)(D). However, invoking FOIA Exemptions 6, 7(A), and 7(C), ATF withheld from release under the FOIA various categories of nationwide data for the specified periods of time described above. See pp. 4-5, *supra*.[5]

4. Respondent then brought this action. The district court granted the City's motion for summary judgment and ordered release under the FOIA of the Trace and Multiple Sales Databases. Pet. App. 19a-30a. The court first held that neither Exemption 6 nor Exemption 7(C) authorized the agency's withholding of the names and addresses contained in the ATF files. *Id.* at 23a-25a. The court found that "whatever small privacy interest an individual may have in protecting his identity in connection with the purchase or possession of a weapon is greatly outweighed by the public interest in the disclosure of this information." *Id.* at 24a (citation omitted). The district court also held Exemption 7(A) to be inapplicable, finding that the government had failed to "explain[] specifically how [the requested] information would allow an individual to interfere with an enforcement proceeding." *Id.* at 26a-27a. The court subsequently amended its judgment to require ATF to produce all requested information contained in the Trace and Multiple Sales Databases through the date of production. Gov't C.A. App. 126-127.

[5] FOIA Exemption 6, 5 U.S.C. 552(b)(6), authorizes withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 6 is no longer at issue in this case. See note 7, *infra*.

5. The Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1a-16a.

a. The court of appeals held that Exemption 7(A) is inapplicable, stating that "ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information." Pet. App. 9a. The court rejected ATF's determination that if the databases were released, an individual could use the withheld information to deduce that a particular investigation is underway. The court found that ATF had identified no "single instance in which information has been pieced together in this type of scenario." *Id.* at 8a. It also rejected ATF's assertion that release of the data could identify and thereby threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation, stating that "ATF's witnesses failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." *Ibid.*

b. The court of appeals also held that the names and addresses of individuals contained in the databases are not protected from public disclosure under FOIA Exemption 7(C). Pet. App. 13a-15a. The court recognized that application of Exemption 7(C) requires a balancing of the privacy interest implicated by release against the public interest in disclosure. *Id.* at 13a. With respect to the privacy interest involved, the court "agree[d] with the district court that the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private transaction." *Id.* at 13a-14a. The court of appeals further held that any "minimal privacy interest" that might be implicated was "substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *Id.* at 14a.

c. The government filed a petition for rehearing en banc. On July 25, 2002, the court of appeals denied that petition. Pet. App. 17a-18a. In the order denying rehearing, the court amended its prior opinion to insert, after the first full paragraph on page eight of the slip opinion (the first full paragraph on *id.* at 9a), the following paragraph:

> We are not asking ATF to identify a *specific* instance in which the release of information has interfered with enforcement proceedings—we concede that this would be impossible, in light of the fact that this type of information has never before been released, and until it has, it cannot be misused. Moreover, *Robbins Tire* makes clear that a showing of specific instances of interference is not required. 437 U.S. at 236. But this does not end our inquiry. ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records.

Id. at 17a-18a.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted to determine (1) whether individual names and addresses contained in the Trace and Multiple Sales Databases are protected from compelled disclosure by FOIA Exemption 7(C), and (2) whether that and other information contained in the Trace Database is protected by Exemption 7(A).[6] In balancing the private and public interests implicated by disclosure of

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[6] The government does not seek review of the court of appeals' holding that information contained in the Multiple Sales Database is not protected by Exemption 7(A).

individual names and addresses in the two databases, the court of appeals disregarded well-established FOIA principles. Indeed, the court's analysis of each side of the Exemption 7(C) balance squarely conflicts with decisions of this Court and of other courts of appeals. Compelled release of the names and addresses withheld by ATF under Exemption 7(C), moreover, would significantly intrude upon the privacy of hundreds of thousands of individuals—including firearms purchasers, potential witnesses to crime, and others —without meaningfully assisting the public to evaluate the conduct of the federal government.

The court of appeals' decision to order disclosure of virtually the entire Trace Database also warrants this Court's review. Release of that database would allow members of the general public to learn, with respect to each of more than one *million* criminal investigations, such information as the fact that a firearm trace was requested; the identity of the law enforcement agency requesting the trace; the serial number and specifications of a firearm believed to have been involved in a crime; the names of the firearm's last possessor and any persons with him at the time law enforcement personnel obtained the gun; the date on which the firearm was recovered; and the location of the recovery. The manifest sensitivity of that information, and the obvious likelihood that release of the data would, in the aggregate, cause immense harm to law enforcement interests, make it evident that blanket disclosure of the Trace Database "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A).

ATF did not rest on logical inference alone, however, but submitted a lengthy and detailed declaration that described the harms that could be expected to result from premature public disclosure of different categories of data. Despite the obvious foreseeability that disclosure of the vast quantities of sensitive law enforcement information contained in the

Trace Database would impair law enforcement interests, and the government's extensive evidentiary submission, the court of appeals ordered release of the database virtually in its entirety, based on the court's conclusory assertion that the government's predictions of likely harm were "not *reasonable*" but were instead "far-fetched hypothetical scenarios." The court of appeals' ruling, in the face of ATF's evidentiary submission, that ATF must make a blanket disclosure of such law enforcement data cannot be reconciled with this Court's decision in *Robbins Tire*, and the effect of the court's decision is to require the disclosure of the sorts of information that other courts of appeals have ruled may be withheld under Exemption 7(A). Moreover, the court of appeals' ruling, if allowed to stand, would enable suspects and others to utilize confidential law enforcement information so as to hinder open criminal investigations; would threaten the safety of law enforcement officers, witnesses, informants and other individuals; would discourage the creation and use of similar databases by ATF and other federal agencies; and may well deter other law enforcement personnel from requesting firearm traces.

I. The court of appeals rejected the government's submission that individual names and addresses in the Trace and Multiple Sales Databases are protected from compelled disclosure under the FOIA by Exemption 7(C).[7] In so

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[7] The court of appeals also held that individual names and addresses contained in the two databases are not protected from compelled disclosure by FOIA Exemption 6. See Pet. App. 10a-13a. The government does not seek review of that holding because it has no practical impact on the disposition of this case. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7(C) covers "records or information compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Ex-

ruling, the court grossly departed from well-established FOIA principles. To determine whether release of particular records would cause an "unwarranted invasion of personal privacy" within the meaning of Exemption 7(C), a court must balance the privacy interest that would be compromised by disclosure against the public interest, if any, that release of the requested records could be expected to advance. See p. 3, *supra*. With respect to each side of this Exemption 7(C) balance, the court of appeals' analysis is wrong and conflicts with decisions of this Court and of other courts of appeals.

A. In assessing (and almost entirely discounting) the privacy interests implicated by disclosure of hundreds of thousands of individual names and addresses contained in the Trace and Multiple Sales Databases, the court of appeals reasoned that

> the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private transaction. The Gun Control Act requires that a transaction for the sale of a firearm be recorded and every dealer is required to make business records available to investigation. Again, every purchaser of a firearm is on notice that their name and address must be reported to state and local authori-

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emption 7(C), which contains the phrase "could reasonably be expected" and refers to an "unwarranted" rather than a "clearly unwarranted" invasion of privacy, is thus "more protective of privacy than Exemption 6." *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 n.6; see *Reporters Committee*, 489 U.S. at 756. Because there is no dispute that the records in this case satisfy Exemption 7's threshold requirement (*i.e.*, that the Trace and Multiple Sales Databases were "compiled for law enforcement purposes"), any information contained in those databases that is covered by Exemption 6 would necessarily be protected by Exemption 7(C) as well.

> ties and ATF. As a result, there can be no expectation of privacy in the requested names and addresses.

Pet. App. 13a-14a (citations omitted). That analysis is seriously flawed.

1. Disclosure of personal information *to the government* cannot reasonably be equated with disclosure of the same information to the public at large. Indeed, taken to its logical conclusion, the court of appeals' approach would render Exemption 7(C) a practical nullity. *Every* item of federal law enforcement data for which Exemption 7(C) is invoked is by definition known to some agency of the federal government; otherwise it would not appear in records responsive to a FOIA request. The government's possession of particular data may prevent the information from being *entirely* private or confidential, but indiscriminate release of the data to the general public nevertheless implicates substantial privacy interests.

This Court has employed a pragmatic approach in analyzing the privacy interests that might be affected by release under the FOIA of particular categories of information. In *Reporters Committee*, for example, the Court held that individuals have a substantial privacy interest in preventing public release of their "rap sheets," even though the various events summarized on a rap sheet have been publicly disclosed at some prior time. See 489 U.S. at 762-764. The Court explained that, with respect to the practical impact on privacy that different forms of release might entail, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764; see *Dep't of Defense* v. *FLRA*, 510 U.S. at 500. *A fortiori*, disclosure of a firearms purchaser's name and address to a limited class of govern-

ment officials who have access to *non-public* files does not negate the individual's privacy interest in avoiding indiscriminate release of that information to the general public pursuant to the FOIA. The court of appeals' analysis also ignores the fact that many of the individuals whose names and addresses appear in the Trace Database are not firearms purchasers at all, but are (for example) associates of the last known possessor of a traced weapon.

This Court's "decisions establish that whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." *Reporters Committee*, 489 U.S. at 771. Thus, in conducting the Exemption 7(C) balancing in this case, the courts below were required to consider the effect on privacy that would result if the names and addresses in the ATF databases were made available to the general public—not the (presumably smaller) impact of disclosure to respondent alone.[8] This Court and the courts of appeals have repeatedly recognized that disclosure pursuant to the FOIA of individual names and addresses in the possession of a federal agency implicates legitimate privacy interests that must be weighed in the Exemption 7(C) balance. See *Dep't of Defense* v.

[8] This does not mean that respondent's governmental status, and its corresponding interest in obtaining law enforcement data, have no bearing on ATF's overall disclosure decisions. ATF released to respondent a substantial volume of data pertaining to firearms crimes and multiple purchasers in Chicago, as a discretionary release to local law enforcement pursuant to the Gun Control Act of 1968. See p. 7, *supra*. Respondent's governmental status and interests are irrelevant, however, to its claim of entitlement to agency records *under the FOIA*. Yet the consequence of the Seventh Circuit's decision is to require the public disclosure of vast amounts of private data on a nationwide basis, far beyond the reach of respondent's governmental jurisdiction and notwithstanding the substantial countervailing privacy and law enforcement interests of individuals and law enforcement agencies in other jurisdictions.

FLRA, 510 U.S. at 501; *United States Dep't of Navy* v. *FLRA*, 975 F.2d 348, 353 (7th Cir. 1992) ("federal employees have a privacy interest in the non-disclosure of their names and home addresses"); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989) ("the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant"), cert. denied, 494 U.S. 1078 (1990); *FLRA* v. *Dep't of Defense*, 977 F.2d 545, 549 (11th Cir. 1992) ("we think the privacy interest in a home address is important"). The court of appeals' decision cannot be reconciled with those precedents.

2. With respect to the Trace Database, the court of appeals' minimization of the privacy interest implicated by disclosure of individual names and addresses is particularly misguided. Under the Gun Control Act of 1968, a request for an ATF firearm trace must be premised on the existence of a "bona fide criminal investigation." See 18 U.S.C. 923(g)(1)(B)(iii); 18 U.S.C. 923(g)(7). Release of names and addresses within the Trace Database would thus publicly link identified individuals with the criminal investigations that originally gave rise to the pertinent trace requests. With respect to that database, the relevant privacy interest is therefore that of *all* private citizens, including both firearms purchasers and others (see p. 14, *supra*), in avoiding public disclosure of their names and addresses *in connection with a criminal law enforcement investigation.*

"Numerous courts of appeals have recognized that individuals involved in a criminal investigation—including suspects, witnesses, interviewees, and investigators—possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation." *Landano* v. *United States Dep't of Justice*, 956 F.2d 422, 426 (3d Cir.) (citing cases), cert. denied, 506 U.S. 868 (1992).

Those decisions reflect a longstanding judicial consensus that "the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Fitzgibbon* v. *CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (citation omitted). That privacy interest exists regardless of whether the individual named in the file is identified as a suspected wrongdoer. See, *e.g.*, *ibid.* ("[E]xemption 7(C) takes particular note of the strong interest of individuals, whether they be suspects, witnesses, or investigators, in not being associated unwarrantedly with alleged criminal activity.") (citation and internal quotation marks omitted); *Manna* v. *United States Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir.) ("law enforcement officers, interviewees and witnesses involved in criminal investigations, not just suspects, have a substantial privacy interest in nondisclosure of their names because disclosure may result in embarrassment and harassment") (citation and internal quotation marks omitted), cert. denied, 516 U.S. 975 (1995); *Neely* v. *FBI*, 208 F.3d 461, 464-465 (4th Cir. 2000); *Burge* v. *Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991). The court of appeals' holding in this case, that release of individual names and addresses in the Trace Database would implicate no meaningful privacy concerns, is squarely in conflict with those decisions.

3. Finally, with respect to the Trace Database, the premise of the court of appeals' privacy analysis is factually incorrect. Although licensed firearms dealers are required to report to ATF the names and addresses of multiple purchasers (*i.e.*, persons who have bought two or more handguns within five business days), no comparable reporting requirement applies to firearms purchasers generally. The court of appeals was therefore simply wrong in stating that "every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF." Pet. App. 14a. To the contrary, the Gun Control

Act of 1968 specifically precludes ATF from imposing any system for the registration of firearms, firearms owners, or firearms transactions or dispositions. 18 U.S.C. 926(a); see Pet. App. 63a-64a.[9]

B. The court of appeals' analysis of the "public interest" side of the Exemption 7(C) balance is likewise misconceived. This Court has made clear that "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 (brackets, citation, and internal quotation marks omitted); see *Bibles*, 519 U.S. at 355-356; *Reporters Committee*, 489 U.S. at 773. Thus, even where a FOIA requester's interest in obtaining federal records is legitimate in and of itself—as is undoubtedly true of (for example) a labor union's desire "to communicate more effectively with employees," *Dep't of Defense* v. *FLRA*, 510 U.S. at 497—that interest is irrelevant to the Exemption 7(C) analysis unless disclosure of the information at issue would assist the public in evaluating the conduct of the federal government.

The court of appeals' assessment of the public interest ostensibly served by disclosure of names and addresses in this case cannot be reconciled with the foregoing principles. The court of appeals acknowledged the settled rule that "the City's particular interests in enforcing its gun ordinances do not weigh into the equation under Exemption 7(C)." Pet. App. 14a. But the court nevertheless referred repeatedly to

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[9] The Act requires licensees to provide information to ATF about firearms transactions only in limited circumstances—for example, licensees must report multiple sales, and they must provide information from their records necessary to trace the disposition of a firearm in connection with a bona fide criminal investigation. See 18 U.S.C. 923(g).

those interests in the course of its analysis. Indeed, the court introduced and summarized its assessment of the Exemption 7(C) balance with the statement that any privacy interest implicated by release of individual names and addresses "is substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *Ibid.*; see *id.* at 15a (noting "the City's interests in preventing illegal handgun trafficking and preserving the integrity of Chicago's gun control ordinances"); *ibid.* (observing that "[t]here is a strong public policy in facilitating the analysis of national patterns of gun trafficking and enabling the City to enforce its criminal ordinances"). A similar misapplication of Exemption 7(C) principles by a panel of the Ninth Circuit resulted in summary reversal by this Court. See *Bibles*, 519 U.S. at 355-356.

The court of appeals also stated that "[i]nherent in [respondent's] request for the records is the public's interest in ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking." Pet. App. 14a. The court of appeals made no effort, however, to explain how disclosure of individual names and addresses of private citizens could cast light on ATF's performance of its statutory responsibilities. Cf. *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989) (when a court balances private and public interests under Exemption 7(C), "merely stating that [a public] interest exists in the abstract is not enough; rather, the court should * * * analyze[] how that interest would be served by compelling disclosure" of specific "identifying information"); *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (requester's "general interest in 'getting to the bottom' of" a particular controversy did not outweigh privacy interests where withheld information would link individuals with a law enforcement investigation).

Indeed, the District of Columbia Circuit has "h[e]ld categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *Safe-Card Serv., Inc.* v. *SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). Because respondent has not even alleged agency misconduct here, let alone submitted "compelling evidence" in support of such an allegation, the government's invocation of Exemption 7(C) with respect to the names and addresses contained in the Trace and Multiple Sales Databases would necessarily have been sustained if this case had arisen in the District of Columbia Circuit.

II. The question whether information contained in the Trace Database is protected by FOIA Exemption 7(A) also warrants this Court's review. Public disclosure of that database would reveal, with respect to each of more than one million investigations, a variety of sensitive law enforcement information. In invoking Exemption 7(A) in this case, the government offered a lengthy and detailed declaration that described the ways in which premature public disclosure of different categories of data could be expected to result in interference with law enforcement proceedings. See note 1, *supra*. The court of appeals ultimately found Exemption 7(A) to be inapplicable, based solely on its conclusory assertion that ATF's considered judgments concerning likely future harm that would result from disclosure of the Trace Database—which reflects hundreds of daily interactions between ATF and other law enforcement agencies—"are not *reasonable*" but are instead "only far-fetched hypothetical scenarios." Pet. App. 18a. The court's decision is profoundly

misguided and threatens substantial harm to law enforcement.[10]

A. Under the Gun Control Act, ATF is authorized to trace the prior ownership of individual firearms only in conjunction with a "bona fide criminal investigation." See p. 15, *supra*. The "vast majority" of trace requests originate with law enforcement agencies other than ATF. Pet. App. 37a. Because ATF is not typically informed when the requesting agency has closed its investigation in a particular case, *id.* at 37a-38a, it must employ reasonable generalizations to determine how long various categories of data must be withheld in order to avoid disruption of ongoing enforcement proceedings.

Every item of data within the Trace Database, however, corresponds to what was at the time of the trace request an open criminal investigation. With respect to each of more

[10] The apparent effect of the court of appeals' decision is to require release of virtually the entire Trace Database. The court appears to have accepted, and to have decided this case on the basis of, respondent's representation that "any highly sensitive traces are coded and were not included in the City's FOIA requests." Pet. App. 9a. The court's statement refers to a "do not contact" code that a requesting law enforcement agency may include in its trace request, which alerts ATF that in conducting the trace it should not contact a particular retail dealer because, *inter alia*, the dealer may be involved in criminal activity. See 01/24/01 Tr. 158-159. ATF has informed this Office, however, that "do not contact" traces are relatively rare, constituting approximately 1% of all traces. And, contrary to the court of appeals' statement that "any highly sensitive traces are coded," nothing in the record suggests that the "do not contact" traces as a group are more sensitive from a public disclosure perspective than other firearm traces (including traces related to homicides and other violent crimes in which the dealer is not a suspect). Thus, exclusion of data regarding "do not contact" traces from the disclosure obligation imposed by the court of appeals would not significantly ameliorate the practical harms that would be caused by disclosure of the requested data.

than one million traces, disclosure of that database would reveal such sensitive information as the fact that a firearm trace was requested; the identity of the law enforcement agency requesting the trace; the serial number and specifications of a firearm believed to have been involved in a crime; the names of the firearm's last possessor and any persons with him at the time law enforcement personnel obtained the gun; and the date and location of the firearm's recovery. And because each trace is premised on the requesting agency's suspicion of criminal activity involving a *firearm*, the danger that any efforts to disrupt the investigation might take a violent form is readily apparent. Given those facts, and given the uncertainty regarding which investigations remain open at the time of a particular FOIA request, "ATF must be extremely cautious in disclosing law enforcement data from the [Trace Database] to members of the public under the FOIA." Pet. App. 38a.[11]

[11] On July 15, 2002, the House Committee on Appropriations expressed similar concerns in reporting out a bill that would prohibit the use of appropriated funds to disclose, pursuant to the FOIA, any data from the Trace Database or the Multiple Sales Database other than data ATF traditionally has disclosed pursuant to its established FOIA policy:

> The Committee is concerned that certain law enforcement databases may be subject to public release under the Freedom of Information Act (FOIA). As a result, information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases. What is a greater concern is that such release could be accomplished on a comprehensive basis, making all such data available to the public. The need to maintain these databases on a limited confidential basis that has been in place at ATF for several years for tracing records derives from the long-term nature of criminal investigations. In addition to jeopardizing criminal investigations and officer safety, such information, once released, might easily be disseminated through the Internet. This would not only pose a risk to law enforcement and homeland security, but also to the

B. In *Robbins Tire*, this Court held that an agency, in invoking Exemption 7(A), need not prove that release of the specific records that are the subject of a FOIA request would interfere with the individual law enforcement proceeding to which those records are connected. 437 U.S. at 236-238. Rather, the agency may employ "generic determinations" and may satisfy its burden under Exemption 7(A) by demonstrating "that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *Id.* at 236.

At the time of the Court's decision in *Robbins Tire*, Exemption 7(A) applied to law enforcement records where release "would * * * interfere with enforcement proceedings." 437 U.S. at 223. The subsequent enactment of the Freedom of Information Reform Act of 1986 (Reform Act), Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48, reinforced the validity of a categorical, pragmatic approach to applying Exemption 7(A). The Reform Act amended Exemption 7(A) to cover law enforcement records whose release "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A), thereby easing the government's burden. As the Senate Report accompanying a predecessor bill explained, the amendment "recognizes the lack of certainty in attempting to predict harm" and thus requires only "a standard of reasonableness in that process, based on an objective test." S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983); see *Reporters Committee*, 489 U.S. at 778 n.22 (explaining that parallel amendment to Exemption 7(C) "amply supports a categorical approach to the balance of private and public interests" under that exemption).[12]

The need for a categorical approach is particularly evident in this case. As the government's declaration explains, the Trace Database contains the results of more than 1.2 million firearm traces. Pet. App. 37a. It is obviously infeasible for ATF to identify, on a trace-by-trace basis, the specific data that could safely be disclosed to the public without compromising open law enforcement investigations. In processing respondent's FOIA request, the agency therefore relied of necessity on reasonable generalizations concerning the categories of information for which disclosure would and would not be appropriate. Cf. *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989) ("This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the [FOIA]").

C. ATF's disclosure policies reflect a careful effort to release as much information to the public as can safely be

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privacy of innocent citizens. The Committee therefore includes language (Section 642) ensuring that no appropriated funds may be available to ATF to take any action under the FOIA with respect to such law enforcement records, except that disclosure of information collected or maintained under 18 U.S.C. 846(b), 923(3) or 923(g)(7) or from Federal, State, local or foreign law enforcement in connection with arson or explosives incidents or the tracing of a firearm may continue in accordance with long standing agency practice.

H.R. Rep. No. 575 (to accompany H.R. 5120), 107th Cong., 2d Sess. 20 (2002). On July 24, 2002, the Treasury Appropriations bill and Conference Report on H.R. 5120 were passed by the House of Representatives. 148 Cong. Rec. H5352 (daily ed. July 24, 2002).

[12] The courts of appeals have repeatedly recognized that the Reform Act effectively broadens the coverage of Exemption 7(A) and reinforces the need for a pragmatic approach. See, *e.g.*, *Manna*, 51 F.3d at 1164 n.5 (Congress amended Exemption 7(A) to "relax significantly the standard for demonstrating interference"); *Alyeska Pipeline Serv. Co.* v. *EPA*, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (trial court, in relying on pre-amendment version of Exemption 7(A), improperly "required EPA to meet a higher standard than FOIA now demands"); *Curran* v. *Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease—rather than to increase—the government's burden in respect to Exemption 7(A).").

disclosed without compromising law enforcement activities or impairing individuals' privacy. Except for individual names and addresses, which are withheld indefinitely pursuant to Exemption 7(C), virtually *all* of the information in the Trace Database is released to the public after the period for withholding under Exemption 7(A) expires. And apart from the names and addresses, all but nine of the approximately 300 data elements in the database are withheld for a period of only one year (the other nine are withheld for five years). See Pet. App. 46a, 47a-48a. Thus, far from reflexively opposing all public scrutiny of information contained in the Trace Database, ATF has sought conscientiously to implement a nuanced disclosure policy that advances FOIA's open government objectives while safeguarding law enforcement efforts.

D. To explain and defend the withholding practices that are at issue in this case, ATF did not simply offer conclusory assertions that release of the requested records would undermine law enforcement. Rather, ATF submitted a declaration, executed by an agency official with long experience in law enforcement, firearm tracing, and FOIA implementation (see note 1, *supra*), that was both comprehensive and highly detailed. See Pet. App. 31a-71a. Appended to that declaration were letters from the heads of two organizations that represent law enforcement officers nationwide, opposing public disclosure of the Trace Database on the ground that release would hinder criminal investigations and threaten harm to law enforcement personnel and others. See note 1, *supra*.

ATF's declaration described in general terms the law enforcement concerns implicated by release of firearm trace information. See Pet. App. 37a-39a. It provided illustrative scenarios in which premature disclosure of the requested firearm trace information could be expected to result in disruption of law enforcement investigations. *Id.* at 39a-41a.

In addition, the declaration contained individualized analyses of the disclosure issues pertaining to each of the six general categories of information contained in the Trace Database. See *id.* at 48a-49a (requester information data); *id.* at 49a-52a (weapon data); *id.* at 52a-53a (recovery location data); *id.* at 53a-54a (possessor and associates data); *id.* at 54a-58a (dealer identification data); *id.* at 58a-59a (purchaser identification data).[13] ATF's declaration thus exemplifies the generic or categorical approach endorsed by this Court in *Robbins Tire*.

E. The court of appeals wholly failed to articulate any cogent rationale for its rejection of ATF's evidentiary submission.

1. In its initial opinion, the court of appeals repeatedly chided the government for failing to identify (a) specific instances in which release of similar information had previously caused interference with law enforcement activities, or (b) specific current investigations that would be impeded by disclosure of the requested data. See Pet. App. 8a-10a. The court did not expressly announce that an agency in invoking Exemption 7(A) must always support its predictions of harm by reference to specific prior or current investigations. But given the court of appeals' repeated references to that supposed gap in the government's proof, and the court's failure to identify any *other* defect in ATF's evidentiary submission, the court's initial opinion is most naturally read to reflect the view that some such showing is required.

Any such evidentiary requirement is flatly inconsistent with *Robbins Tire*, which made clear that an agency in invoking Exemption 7(A) may rely on reasonable categorical

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[13] The first four categories represent data obtained from the agency requesting a firearm trace; the last two categories represent information that ATF acquires in the course of the tracing process and then provides to the agency that has requested the trace.

judgments and is not required to establish that release of the withheld information would interfere with a *specific* existing or contemplated law enforcement proceeding. See p. 22, *supra*. The government filed a petition for rehearing in this case, which noted that inconsistency with *Robbins Tire*. Gov't Pet. For Reh'g 9-10. The petition also pointed out that, because ATF had not previously released the sort of information that is at issue in this case, it could not plausibly be expected to identify prior instances in which similar releases had resulted in harm to law enforcement efforts. *Id.* at 10-11.

2. In response to that rehearing petition, the court of appeals amended its opinion to acknowledge that the government need not identify specific instances of prior harm. Pet. App. 17a-18a. Under the court of appeals' amended opinion, the court's affirmance of the district court's judgment rests on the statement that "ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records." *Id.* at 18a. We do not dispute the abstract proposition of law, reflected in the court of appeals' amended opinion, that an agency's predictions of harm to law enforcement will support withholding of documents pursuant to Exemption 7(A) only if those predictions are "reasonable." See, *e.g.*, *Crooker* v. *BATF*, 789 F.2d 64, 67 (D.C. Cir. 1986) (R.B. Ginsburg, J.) (agency must "trace a rational link" between nature of document and likely interference). The substance of the court's reasonableness analysis, however, which denies protection under Exemption 7(A) to vast quantities of sensitive law enforcement information concerning open criminal investigations, "has so far departed from the accepted and usual course of judicial

proceedings" (Sup. Ct. R. 10(a)), and threatens such substantial harm to law enforcement interests, as to warrant this Court's review.

In order to ensure that the FOIA does not place exorbitant burdens on the federal agencies subject to its requirements, it is not enough that the Act's substantive provisions are given a workable and pragmatic construction. It is essential as well that the litigation process itself be conducted in a manner that is respectful of the government's legitimate interests. In the present case, ATF provided a detailed explanation of its withholding practices; yet the court of appeals, in rejecting the agency's predictions of likely harm, made no effort to explain in what way ATF's evidentiary showing was deficient, other than to note the agency's failure to identify specific past or present investigations—a failure that the court ultimately acknowledged was *not* a sufficient ground for finding Exemption 7(A) to be inapplicable. The court's summary dismissal of the agency's evidence is particularly remarkable given ATF's nuanced disclosure policy and supporting declaration, which carefully distinguish between different categories of information with respect both to the length of time for which data are withheld and to the justifications for withholding. See pp. 24-25, *supra*. The court of appeals' brusque rejection of the agency's predictions as "far-fetched" rather than "reasonable"—a characterization presumably meant to cover each of the distinct justifications offered by the agency for withholding several categories of data—reflects either a profound lack of respect for the considered judgment of the expert agency, or the imposition of evidentiary burdens so demanding that they would effectively subvert ATF's ability to employ the "categorical" approach to the implementation of Exemption 7(A) that was approved by this Court in *Robbins Tire*.

The court of appeals' decision, and the opaque character of its amended opinion, are likely to chill the formation and use of comprehensive databases by ATF and other federal law enforcement agencies. Because the sensitivity of the information in the Trace Database is so apparent, and because the court of appeals offered no meaningful explanation for rejecting ATF's extensive factual submission, agency officials in other settings now face substantial doubt as to their ability to maintain the confidentiality of various compilations of data. And because an adverse ruling with respect to a single database can result in the compelled disclosure of vast quantities of information, reasonable agency officials will surely hesitate to utilize similar databases if the court of appeals' decision is allowed to stand. The practical impact of the court of appeals' decision can therefore be expected to extend well beyond the circumstances of this case.

Indeed, even if the Trace Database is viewed in isolation, the court of appeals' decision is one of great practical consequence. The effect of the court's decision is to require sweeping disclosure of categories of information, such as the names of potential witnesses and others contacted by law enforcement in connection with open criminal investigations, that other courts of appeals have recognized to be protected by Exemption 7(A). See *Swan* v. *SEC*, 96 F.3d 498, 499 (D.C. Cir. 1996); *Manna*, 51 F.3d at 1165; *North* v. *Walsh*, 881 F.2d 1088, 1097-1098 (D.C. Cir. 1989) (R.B. Ginsburg, J.); *Lewis* v. *IRS*, 823 F.2d 375, 378-379 (9th Cir. 1987). As the government's declarant explained, "[t]he premature release of all of the information sufficient to trace firearms relating to an open investigation may well compromise a criminal case in that evidence may be tampered with or the safety of investigators, informants and witnesses may be jeopardized." Pet. App. 42a. The cumulative harms caused by release of the requested records are likely to be very substantial. That is partly due to the sheer volume of information that the database contains. See *id.* at 37a ("As of November 9, 2000, the [Trace Database] contain[ed] the results of 1,261,593 traces."). In addition, the features of the Trace Database that make it an especially useful investigative resource for ATF's Special Agents nationwide—*e.g.*, its computerized format and the consequent accessibility of discrete data entries contained within it—increase the potential for misuse if the database is made available to persons with an incentive to disrupt law enforcement investigations. Cf. *Reporters Committee*, 489 U.S. at 764 (public disclosure of "computerized summary" of individual's criminal history more greatly impairs individual's privacy interests than does "scattered disclosure of the bits of information contained" in the summary).

If left unreviewed, the court of appeals' decision may also deter other law enforcement agencies from requesting firearms traces in the first instance, thereby impairing ATF's ability to work in conjunction with those agencies to investigate and combat firearms crimes. As ATF's declarant explained, "it is a standard operational security practice in the law enforcement community that shared investigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure could compromise an investigation or reveal the identities of law enforcement personnel or third parties." Pet. App. 41a-42a. ATF has informed us that, since the issuance of the district court's ruling in March 2001, the police departments of more than 40 cities—including the City of Chicago—have signed memoranda of understanding with ATF specifically providing that "the law enforcement sensitive firearms trace information generated pursuant to the Agreement shall not be disclosed to a third party without the consent of both parties to the Agreement." If as a result of the court of appeals' decision ATF were unable to honor the confidential-

ity provisions of those agreements, those (and other) local jurisdictions may be less willing to submit trace requests, and the effectiveness of the tracing program and the law enforcement investigations it is designed to assist will be correspondingly reduced.

Thus, in light of the strength of the government's evidentiary submission, the cursory and dismissive nature of the court of appeals' analysis, and the immense practical consequences of the court of appeals' holding that the Trace Database must be disclosed, the question whether Exemption 7(A) covers the database warrants this Court's review. Cf. *Reporters Committee*, 489 U.S. at 760 (Court granted certiorari "[b]ecause of the potential effect of the Court of Appeals' opinion on values of personal privacy"); *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982) (certiorari granted "[b]ecause th[e] interpretation of [Exemption 7(C)] has important ramifications for law enforcement agencies, for persons about whom information has been compiled, and for the general public"); *Federal Open Mkt. Comm.* v. *Merrill*, 443 U.S. 340, 343 (1979) ("[w]e granted certiorari on the strength of the Committee's representations that this ruling could seriously interfere with the implementation of national monetary policy").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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